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CURRENT TOPICS.

The plethora which exists in the docket of our Supreme Court (which the Constitutional Amendment that is to be submitted to the voters in November is designed to remedy) is simply a counterpart to the condition of affairs that exists in many other States; and in nearly all of them there is active discussion of proposed remedies. It may not be uninteresting then to our subscribers, without as well as within the State, to call attention to the cardinal provisions of the proposed Amendment, and to the views contained in a report of Judiciary Committee of the St. Louis Bar Association in response to the question, referred to them by resolution, at a recent meeting: "What, if any, action should be taken by the association concerning the proposed amendment to the Constitution of Missouri in regard to the changes in the Supreme Court of the State?"

For the benefit of those not familiar with the judicial system of Missouri, it is needful to premise that the St. Louis Court of Appeals has at present jurisdiction, within a limited territory, of appeals and writs of error in both civil and criminal cases, and that from it, except in cases within certain pecuniary limits and in certain classes of cases, appeal lies to the Supreme Court. Without the territory which is included in the jurisdiction of the St. Louis Court of Appeals, the appeal lies directly from the circuit to the Supreme Court.

The most noteworthy provisions of the proposed amendment are: 1. The increase of the number of judges of the Supreme Court from five to six; 2. Their separation into two divisions with criminal and civil jurisdiction respectively; the criminal side to hear in addition to appeals and writs of error in criminal cases, all cases for damages in torts, and applications for writs; of *habeas corpus*, and *quo warranto*, *mandamus*, *certiorari* and other remedial writs; and two judges of either side to constitute a quorum; 3, that the Chief Justice shall have a superintending jurisdiction to order a re-hearing whenever it shall appear to him that the criminal side of the court has within twenty days rendered a decision contrary to some decision of the civil side; 4, the restriction of the jurisdiction of the St. Louis Court of Appeals to the 8th Judicial Circuit, and the relieving it of any criminal jurisdiction, and the provision that its civil jurisdiction shall be final; 5, the provision that the Chief Justice of the Supreme Court shall have a superintending jurisdiction over the St. Louis Court of Appeals, to issue a *certiorari* (whenever it is "made to appear" to him that the St. Louis Court of Appeals has decided a cause contrary to any decision of the Supreme Court, within two months), "to transfer the cause from the Court of Appeals to the Supreme Court for re-hearing, and that on such rehearing, all the judges, both of the Supreme Court and Court of Appeals, or a majority of them, shall sit, the Chief Justice, if present, presiding, and the decision of this tribunal shall be binding authority upon both courts.

Such is the outline of the constitutional amendment to be submitted to the voters in November, and it is entitled to the careful and dispassionate consideration of every voter, and most of all to that of the bar, who are best able to form an intelligent opinion of its merits and demerits, and whose views are likely to have great weight with their neighbors and friends.

The report of the committee above referred to (which is an unusually able and well-reasoned document, and which, much to our regret, we are unable to publish in full, on account of our limited space), contains the recommendation that the proposed amendment be rejected by the people, and assigns the following reasons: 1. The division of the Supreme Court into two benches of three judges each, two of whom constitute a quorum, makes the decision of these two practically final in many cases. Such administration of justice is not contemplated by the Constitution. 2. The objection to such a division is not overcome by the provision in the second section, for a rehearing in certain cases because: *a*. It relates only to cases decided by the criminal side of the court, and leaves the de-

cisions made by the civil side of the court absolutely final. The superiority of grade thus bestowed upon members of the civil side would of necessity lead to jealosies and friction. *b.* The right to rehearing being restricted to cases in which the decision of the criminal side conflicts with some *decision* of the old court, or of the civil side, it follows that upon a question entirely new, a decision of the two or three judges constituting that side of the court is absolutely final, no matter how glaringly erroneous. *c.* The whole time of the chief justice would be of necessity occupied in hearing applications for rehearing, and thus the civil side of the court be reduced to two members; or the chief justice must refuse all such applications, where the right to a rehearing was not apparent at first sight, and thus the object of the provision be defeated. *e.* The vesting of the power to grant a rehearing in the chief justice alone is objectionable, because it makes the fate of a cause depend upon the judgment of one man. *e.* In cases in which a rehearing is granted the cause is reviewed virtually by three appellate courts, (1) the criminal side of the court or the St. Louis Louis Court of Appeals, as the case may be; (2) the Chief Justice on application for rehearing; and (3) the court *in banc.* 3. The granting of final appellate jurisdiction to the St. Louis Court of Appeals of causes arising in the Eighth Judicial Circuit is dangerous and radically wrong. "Your committee is fully impressed with, and gives due weight to, the acknowledged integrity, industry, learning and wisdom of the present judges of the St. Louis Court of Appeals. But we assert that no tribunal of final appellate jurisdiction over the litigation of a municipal community, such as the City of St. Louis should be composed exclusively of judges who are citizens of that community." 4. The provisions for the rehearing of causes decided by the St. Louis Court of Appeals would be ineffectual for the reasons stated above; and the final jurisdiction of the St. Louis Court of Appeals would result in the growth and establishment of a system of judicature and decision essentially differing from that of the balance of the State. The report concludes as follows:

"The tendency of thinking men is toward the creation of intermediate appellate tribunals (with, perhaps, such limited final jurisdiction as is now beneficially exercised by the St. Louis Court of Appeals) as the best method for the relief of courts of last resort, and we believe that this plan will speedily and finally find favor in Missouri.

"But if it be deemed indispensable to adopt a measure of immediate relief, it would be far safer to create at once, by simple legislative enactment, an advisory commission to hear and prepare decisions which may be assigned to it by the Supreme Court, which decisions the court may at its option adopt and promulgate or reject. Such a commission could be abolished as soon as the necessity for its existence may cease.

"In conclusion, it is proper to state that Mr. Finkelnburg, being absent from the State, has not participated in the deliberations of the committee. Messrs. Madill, Slayback and Vastine authorize me to make this report, which is respectfully submitted.

"JAMES TAUSSIG, Chairman."

The views expressed by this committee, and the reasoning by which they have reached the results indicated above, appear to us to be singularly conclusive, and worthy of the most careful attention. It is a singular and striking fact, and one of great weight against the amendment, that the result of their deliberations at this time, when a period sufficiently long for mature reflection has elapsed, should be in such perfect accord with the arguments contained in a letter from Jay L. Torrey, Esq., printed in these columns more than a year ago, soon after the passage of the resolution by the Legislature submitting the Amendment. See 12 Cent. L. J., 310. And it is no mean compliment to our correspondent's insight and sagacity that the views presented by him at that early date should be sustained by the conclusions reached by so able a body as the committee in question, after the lapse of time for mature deliberation.

PARENT AND CHILD.

The parental relation must be considered to have for its true basis natural guardianship.[1] It springs from social law, and *ex necessitate* imposes a duty upon those who hold it. From this duty a right is derived in favor of a parent; and that is the right to have the custody and control of its minor child. Municipal law will not disturb parents in this right where the exercise of it is not abused.[2] "It is perfectly true as a general proposition," says Judge Ware in the case of The Etna, "that a father has the right to the custody and control of the person of his child, * * but no one will contend that a father under the common law, stands in the relation of a sovereign to his child." The right to control is a limited one, but it implies the power to command, *ex proprio vigore*.

It is said by most of the cases that parents are obliged to support their minor children. But, independent of statutes, this can not be sustained; for they are only indemnifying their nature in favor of municipalities, and do not extend to individuals.[3] With this exception, it must follow from the nature of the parental relation, that the obligation is only a moral one, and, unless it is founded upon a prior legal liability, it has no binding force from a legal point of view. Moreover, the right to control the child puts it out of its power to give consent to a contract between the father and it; and as between it and a third person, we shall show that the power of the child to bind its parent upon a contract, is one of agency common to all cases. Parents are not obliged to support their minor children only so far as statute law imposes it.[4]

But the books all agree that, while minor children live with and are supported by their parents, or by one standing *in loco parentis*, their services belong to those holding the parental relation.[5] "So, also, it is a general truth that a father is entitled to the fruits of his child's labor, but it is equally true that this is a right that results directly from the fulfilment of his paternal obligations of providing for the well being of his child," says Ware, Judge, in the case of The Etna.[6] Support and services are dependent upon each other. If the one is withheld, the other is withdrawn; and if the latter is wilfully refused, the former may be denied, as between a parent and third persons, to recover for necessaries furnished to the child. Probably all that is meant by the courts when they say that parents are obliged to support their minor children is, that as between them and a city or town, they are liable, if able to support. Notice that support is being given is required by the statute to affect a defendant with knowledge, from which a promise might be inferred. The difficulty in most cases is, that there is no promise to pay debts contracted by a minor child; and, as the statutes are intended only for the indemnity of the public against paupers, and not for the reimbursement of an individual who may have relieved the sufferings and distress of needy persons, a promise can not be inferred, even though notice be given by one who has provided the support,[7] because there is no legal obligation to found a promise on; and without it a request is necessary. If a child wilfully leaves its father's house, its act is a refusal of services; and if a father drives his child from his house, his act is a renunciation of his right to the child,[8] and it is transferred to the latter by that act. There can be no difference in principle if he should abandon it.[9] But it has been held that where a man had deserted his family, his wife was impliedly authorized to act as his agent to procure necessaries for it.[10] Enlarging the parental to a contractual relation, going a step farther, the following proposition is sustained by the authorities: Parents are not liable upon any contracts made by their minor chil-

1 The Etna, Ware, 474; United States v. Bainbridge, 1 Mason, 78, Hammond v. Corbett, 50 N. H. 501.

2 The Etna, *supra*.

3 Farmington v. Jones, 36 N. H. 271.

4 Kelley v. Davis, 49 N. H. 187; Raymond v. Loyl, 10 Barb. (N. Y.) 483; Gordon v. Potter, 17 Vt. 348.

5 Monoghan v. School District, 38 Wis. 100; Coffin v. Shaw, 3 Ware, 82; Galbraith v. Green, 4 S. & R. (Pa.) 207; Shute v. Dorr, 5 Wend. (N. Y.) 203; Benson v. Remington, 2 Mass. 113; Angel v. McLellan, 16 Mass. 28; United States v. Bainbridge and The Etna, *supra*; Hollingsworth v. Swedenborg, 49 Ind. 378; Gifford v. Kollock, 3 Ware, 45; Nightingale v. Withington, *supra*.

6 *Supra*.

7 Farmington v. Jones, *supra*.

8 United States v. Bainbridge, *supra*.

9 The Etna, *supra;* Nightingale v. Withington, *supra*; Bageley v. Forder, 3 Q. B. 559, Cockburn, C. J., dissentient.

10 Walker v. Laighton, 31 N. H. 111; Rumney v. Keyes, 7 N. H. 571.

dren, unless they have expressly or impliedly authorized them to be made.[11]

The four American cases—Gordon v. Potter, Weeks v. Morrow, Raymond v. Loyl and Kelley v. Davis—best exemplify the rule. The former was decided in 1840. In that case an action was brought to recover the price of cloth and trimmings sold to the defendant's minor son. Defendant told his son in the spring that he could work out, and defendant would get him some clothes in the autumn. Defendant did not refuse to get the clothes, but neglected to get them; and he knew of the purchase. He also gave his son one dollar and part of his son's earnings to pay for making up the clothes. Defendant had judgment. Kelly v. Davis was *assumpsit* for goods sold to defendant's minor son while he was employed by a third person. Some of the articles were, and some were not, necessaries. Defendant knew where his son was. It was held that he was not liable. In Raymond v. Loyl, defendant's son worked for the plaintiff, who provided clothes for him when in a destitute condition. Defendant did not give her consent to the arrangement, and had judgment on the ground of no contract made by her. Weeks v. Morrow, was a case where defendants son left home without the knowledge or consent of his father, who was sued for board furnished to the son. Held, that there was no contract to pay for it by the defendant. Previous to these judgments, the doctrine of Van Valkingberg v. Watson [12] had been followed by some courts. It is, that evidence of a palpable omission to provide support is sufficient to show a binding obligation upon a parent. But this rule goes no further than a moral obligation, a promise founded upon which would be a *nudum pactum*. Under the true rule, there is nothing peculiar about the relation of parent and child; they stand upon the same footing with those not holding the relation. The same amount of proof necessary in an ordinary case to make out a contract, is required in a case where the parental relation is made an element. An agency can not be inferred from the parental relation.

A minor son, while in college, purchased some articles for his use. His father was sued for the price of them. But evidence that they were purchased under such circumstances did not imply consent of the father.[13] It is a question for the jury to say whether or not the circumstances in any given case imply a promise from the parent to pay for articles purchased by the child.[14] Where a son had left home and had purchased articles for his own use, his father was held liable for the price in an action to recover it, on the ground that he had paid the seller for articles purchased from him by the son previously, and that the agency continued until notice of its revocation.[15]

A fortiori one holding the relation of step-father can not be holden for the debts of his step-child.[16] But if one stands *in loco parentis*—receives the child of his wife by a former husband into his family and treats it as he would his own—the relation is established.[17] The court in Freto v. Brown, says that while a child lives in the family of, and is supported by its "father-in-law," it must be considered a servant as to strangers, who can not question his right to its earnings. But the relation is not binding upon the child. The relation of parent and child is *prima facie* established if its parents are recognized as husband and wife.[18]

It is said by most of the cases on the question of the rights of a mother, that she is not entitled to the services of her minor child after the death of its father, even though she provides support for it.[19] But

[11] Raymond v. Loyl, 10 Barb. 483; Weeks v. Merrow, 40 Me. 151; Kelley v. Davis, *supra;* Owen v. White, 5 Stew. & Port. (Ala.) 435; Ang. I v. McLellan, 16 Mass. 28; Wilson v. Wilson, 52 Iowa, 44; Clark v. Gotts, 1 Ill. App. 455; Bailey v. King, 41 Conn. 365; Kernodle v. Caldwell, 46 Ind. 153; Rogers v. Turner, 59 Mo. 116; Harper v. Lemon, 38 Ga. 227; Clark v. Clark, 46 Conn. 586; Byers v. Thompson, 66 Ill. 421; Mortimer v. Wright, 6 Mees. & W. Bainbridge v. Pickering, 2 W. Bl. 1325; Gordon v. Potter, 17 Vt. 348; Shelton v. Springett, 11 C. B. 452; 2 Kent (11th ed.), 190, note 3.

[12] 13 Johns., 480. See, also, Pidgin v. Cram, 8 N. H. 350; In the matter of Ryder, 11 Paige, 185.

[13] Owen v. White, 5 Stew. & Port. 435,

[14] Kelley v. Davis, *supra;* Ayer v. Ayer, 41 Vt. 55.

[15] Murphy v. Ottenheimer, 84 Ill. 39. See, also, Harper v. Lemon, 38 Ga. 227; Fowlkes v. Baker, 29 Tex. 135; Platts v. Rosebury, 4 Dutch. (N. J.) 146.

[16] Freto v. Brown, 4 Mass. 675; Tubb v. Harrison, 4 T. R. 118; Trescott v. Dennysville, 30 Me. 470.

[17] Mulhern v. McDavitt, 16 Gray, 404; Mowbry v. Mowbry. 64 Ill. 383; Williams v. Hutchinson, 3 Comst. 312; Gorman v. State, 42 Tex. 221; St. Ferdinand, etc. v. Bobb, 52 Mo. 357.

[18] Dalton v. Bethlehem, 20 N. H. 505; Illinois, etc. Co. v. Bonner, 75 Ill. 315.

[19] Pray v. Gorham, 31 Me. 240; E. B. v. E. C. B., 26 Barb. 300; South v. Deniston, 2 Watts, 474; Com-

this rule is ably controverted by the Supreme court of New Hampshire in the case of Hammond v. Corbett.[20] The cases sustaining the above rule are there reviewed with a view to showing that they give no satisfactory reasons for it; and that it was of feudal origin, founded on the doctrine of merger of identity of the wife in her husband. That case is evidently made to rest on the ground of natural guardianship. The action was by trustee process, and the wages of defendant's son were attached. Son was a minor and had never chosen a guardian, nor had one been appointed by probate court. Defendant was a widow. Judgment was for plaintiff, and judgment affirmed by full court. The better and more consistent rule is, that after the death of the father, the mother becomes entitled to the services of her minor child if it is supported by her, and there is no other guardian lawfully appointed.[21] If the old rule ever was sound, the apparent reason for it no longer exists; and the reason ceasing, the law itself ceases. The doctrine probably first found favor in this country in the case of Commonwealth v. Murray, but the decision in that case went off on another point, and it is really no authority.

The right which parents have to the custody and control of their minor children may be transferred to the latter by gift, agreement, inference or conduct.[22] It may be partial[23] or full. Where a father was absent for three years in Canada, did nothing towards the support of his minor child, and took no agency in its affairs, nor claimed any of its earnings, the child was held to have been emancipated.[24] So, too, where a father had given no support to his son, nor made objection to the employment of him for over a year.[25] Also, where a son had brought suit for his earnings after coming of age, and his father knowing of its pendency made no interposition to claim them.[26] A child ceases to have the settlement of its father upon being emancipated.[27] Property acquired by a child after emancipation can not be taken on execution for the debt of its parent.[28] It is not necessary to give notice of emancipation to the public.[29] Before emancipation, a father can maintain an action for the loss of articles of clothing furnished by him to his minor son for personal use.[30] But emancipation by gift is revocable until acted upon;[31] and this upon the ground that acceptance is necessary to a valid gift. Teachers and instructors have a portion of the parental right conferred upon them.[32]

Parents may waive their rights to the services of their minor children.[33] But a waiver does not necessarily amount to emancipation;[34] for the child may still live with and be provided for by its parents. Until the right is given in full, the custody of the child may belong to its parents; but consent of the latter may be presumed when the former offers its services to one for hire.[35] This, however, is only material when the question is who shall bring an action? If the right be waived it can not be reclaimed.[36] A mother can be the agent of her husband to engage the services of their child to a third person.[37] Bounty money paid to a minor for enlisting in the military service is not compensation

monwealth v. Murray, 4 Binn. (Pa.) 487; People v. Merain, 3 Hill, (N. Y.) 400; Morris v. Law, 4 Stew. & & Port. (Ala.) 123.

20 50 N. H. 501; also, Reeve on Dom. Rel. 220.

21 Campbell v. Campbell, 3 Stockt. Ch. (N. J.) 272; Hammond v. Corbett, *supra;* Hollingsworth v. Swedenborg, 49 Ind. 383; Simpson v. Buck, 5 Lans. (N. Y.) 337; Matthewson v. Perry, 37 Conn. 435; Dedham v. Natick, 16 Mass. 135; Nightingale v. Withington, 15 Mass. 272, *dictum.*

22 Cahill v. Patterson, 30 Vt. 592; Orneville v. Glenburn, 70 Me. 353; Burlingame v. Burlingame, 7 Cow. (N. Y.) 92,—verbally; Conover v. Cooper, 3 Barb. 115; Clinton v. York, 26 Me. 167; Stiles v. Granville, 6 Cush. 458; Cloud v. Hamilton, 11 Humph. (Tenn.) 104,—by inference; Dennysville v. Trescott, 30 Me. 470; Wodell v. Coggeshall, 2 Met. (Mass.) 89; Dodge v. Fanor, 15 Gray, 82; Bucksport v. Rockland, 56 Me. 22,—by conduct; Jenney v. Alden, 12 Mass. 375; Fairhurst v. Lewis, 23 Ark. 435.

23 Tillottson v. McCollis, 11 Vt. 477.

24 Canover v. Cooper, *supra.*

25 Huntoon v. Hazleton, 20 N. H. 388.

26 Stiles v. Granville, 6 Cush. (Mass.) 458.

27 Orneville v. Glenburn, *supra.*

28 McCloskey v. Cyphert, 27 Pa. St. 220; Atwood v. Holcomb, 39 Conn. 270; Jennison v. Graves, 2 Blackf. (Ind.) 449; Jenney v. Alden, 12 Mass. 375; Johnson v. Silsbee, 49 N. H. 543; Wolcott v. Rickey, 22 Iowa, 171; Bobo v. Bryson, 21 Ark. 387.

29 Wood v. Corcoran, 1 Allen (Mass.), 405.

30 Dickinson v. Winchester, 4 Cush. (Mass.) 114.

31 Abbott v. Converse, 4 Allen (Mass.), 530.

32 1 Blackstone's Com. 453.

33 Cloud v. Hamilton, *supra;* Hall v. Hall, *supra;* Corey v. Corey, 19 Pick. (Mass.) 29; Dierker v. Hess, 54 Mo. 246; Huntoon v. Hazleton, *supra;* Farrell v. Farrell, 3 Houst. (Del.) 633.

34 Jenniss v. Emerson, 15 N. H. 488.

35 Corey v. Corey, *supra.*

36 Preston Touchstone, 307.

37 Wodell v. Coggeshall, *supra.*

for services, and belongs to him absolutely.[38] It is considered as his property—money received for the act of enlisting. If a parent emancipate its child, and the latter continues in its service, an express contract must be shown by the child to recover pay for it.[39] The services are considered to have been given gratuitously unless there is some agreement to the contrary.

If a child, after coming of age, renders services to its parents, and receives its support from them, there is no presumption of an agreement to pay for the services.[40] There must be something to show an intention that one was to have pay for his services, and the other expected to pay for them when they were commenced;—some request, some act, conduct from which a plain intention can be gathered.[41] The termination of infancy is not *per se* the beginning of a contract. A father who was in circumstances of poverty, requested his son, who was *sui juris*, to return to the father's home and work on the farm, and he would leave his son some property by will. But he died without leaving a will, and the above facts were held sufficient to make a contract for services.[42] Equities existing between a minor and his employer were allowed in an action by the father against the latter for the wages of the former.[43] It was held that the father had not a superior right to them. It is elementary that a father has a superior right to the custody of his child, as against its mother. Where a minor child is being abused by its father, its mother may interfere in its behalf, on the ground that he is exceeding his authority.[44] A child having property, and being in the custody of its parent, who is unable to support it, will be allowed support from its estate by the court, on application of the parent and proof of his inability to provide.[45] As natural guardians, parents have no control of the property of their children.[46]

It is settled that, in actions for the seduction of an infant daughter, the loss of service is gist of the action. Following out the doctrine of natural guardianship, it may be stated as a rule that, so long as a parent, or one standing *in loco parentis*, is entitled to the services of his infant daughter, he can maintain an action for the loss of them against one who has seduced her.[47] The question then is, whether or not a daughter has been emancipated? Emancipation being a question of fact, it follows that an adult daughter can be in the service of her parents.[48] Pregnancy is not necessary to prove a loss of service.[49] "The rule which governs the numerous cases on this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to an action." Per Morton, J.

A parent is not liable for the torts of its minor child, unless it approves them by ratifying or commanding.[50]

As the mode of apprenticing a minor is governed by statute, nothing will be said on this phase of the subject.

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38 Banks v. Conant, 14 Allen (Mass.), 497; Magee v. Magee, 65 Ill. 255; Taylor v. Mechanics' Sav. Bank, 97 Mass. 345; Brown v. Canton, 4 Lans. (N. Y.) 409. *Contra*. Ginn v. Ginn, 38 Ind. 526. Baker v. Baker, 41 Vt. 55.

39 Smith v. Smith, 30 N. J. Eq. 564; Hall v. Hall, *supra*; Barrett v. Barrett, 5 Oreg. 411; Titman v. Titman, 64 Pa. St. 480; Heywood v. Brooks, 47 N. H. 231; Updike v. Ten Broeck, 3 Vroom. (N. J.) 105; Albee v. Albee, 3 Oreg. 321.

40 Arnold v. Franklin, 3 Ill. App. 141; Cooper v. Cooper, 3 Ill. App. 492; Sanders v. Wagonseller, 19 Pa. St. 248; Luney v. Vantyne, 40 Vt. 501; Prickett v. Prickett, 20 N. J. Eq. 478; Hart v. Hart's Adm'x., 41 Mo. 441.

41 Heywood v. Brooks, 47 N. H. 231; Leidig v. Coover's Ex'rs, 47 Pa. St. 534.

42 Freeman v. Freeman, 65 Ill. 106.

43 Schoenberg v. Voight, 36 Mich. 310.

44 Gorman v. State, *supra*.

45 McKnight v. Walsh, 23 N. J. Eq. 136; Trimble v. Dodd, 2 Tenn. Ch. 500.

46 May v. Calder, 2 Mass. 55; Miles v. Boyden, 3 Pick. (Mass.) 213, Linton v. Walker, 8 Fla. 144; Alston v. Alston, 34 Ala. 15.

47 Martin v. Payne, 9 Johns. (N. Y.) 387; Kennedy v. Shea, 110 Mass. 137; Roberts v. Connolly, 14 Ala. 235; Ingersoll v. Jones, 5 Barb. 661; Terry v. Hutchinson, L. R. 3 Q. B. 599; Lee v. Hodges, 13 Gratt. (Va.) 726; Sutton v. Hoffman, 3 Vroom. (N. J.) 58; South v. Denniston, *supra*; Lipe v. Eisenlard, 32 N. Y. 229; Lampman v. Hammond, 3 N. Y. 293; Klopfer v. Bromme, 26 Wis. 372; Abrahams v. Kidney, 104 Mass. 222; Damon v. Moore, 5 Lans. (N. Y.) 454.

48 Sutton v. Hoffman, *supra*; Lipe v. Eisenlard, *supra*.

49 Abrahams v. Kidney, *supra*; Horn v. Freeman, 1 Halst. (Tenn.) 322.

50 Tifft v. Tifft, 4 Denio (N. Y.), 175; Scott v. Watson, 46 Me. 362; Moon v. Towers, 8 C. B. (N. S.) 611; Baker v. Haldeman, 24 Mo. 219.

HUSBAND'S LIABILITY FOR WIFE'S ANTE-NUPTIAL DEBTS.

At the last session of the Missouri legislature, the following law was passed:

"The property owned by a man before his marriage, and that which he may acquire after his marriage, by purchase, descent, gift, grant, devise, or in any other manner whatsoever, and the profits thereof, except such as may be acquired from the wife, shall be exempt from all debts and liabilities contracted or incurred by his wife before their marriage."[1] Similar laws exist in many of the States, and it is of interest to know whether such laws take immediate affect upon all marriages existing at the time they go into operation, or whether they only affect marriages thereafter contracted. In investigating this subject, two questions present themselves: Was it the intention of the legislature that the law should operate upon existing marriages? and if such was the intention, is the law in violation of the constitutional provision against the passage of any "law impairing the obligation of contracts, retrospective in its operation?"[2]

These questions have been very fully considered by the courts of New York and Kentucky under laws similar to the Missouri law, each arriving at a different conclusion.

In New York,[3] the suit was for goods sold to a woman on Oct. 3, 1850; on the 25th of the same month she married; in 1853, an act was passed which provides that "an action may be maintained against husband and wife jointly, for a debt of the wife, contracted before marriage, but that execution on any judgment, in such action, shall only issue against, and the judgment shall only bind the separate estate of the wife." Suit was brought in 1854, and the court below gave judgment according to the terms of this law. The plaintiff appealed, claiming that he was entitled to an absolute judgment against both defendants, as this law did not apply to his debt. The appellate court reversed the court below, holding that the law could not be construed to have a retrospective operation, and that if it were so construed it would be unconstitutional. The reasoning of the court upon the first point was, that there is an established rule of law that the creditor of a woman has the right to sue her husband for her debt contracted before marriage, and that a statute would not be construed as changing this rule, unless such a construction was forced upon the court by the words used, saying: "That no enactment, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action or suits, unless the intention that it shall so operate is expressly declared;" and that the law would be construed as including only cases thereafter to arise, unless the contrary intention should be unequivocally expressed. Upon the other point they say: "The plaintiff, in the case before us, when the act of 1853 was passed, had a vested right of action against both defendants. The husband, as well as the wife, was then his debtor, and the property and estate of the husband would have been bound by the judgment, he was then entitled to obtain. * * * If the act of 1863 is to be considered as releasing the defendant, Adolph, from his personal liability as a debtor to the plaintiff, it is plain that it would operate, in respect to the plaintiff, not as a limitation of his remedies as a creditor, but as the confiscation of a debt." And this the court held to be a violation of the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law."

The suit in Kentucky[4] was on a note given by a woman in 1841. In 1843 she married; in February, 1846, a law passed, "that the estate and property of the husband shall not be subject to the payment of any contract, liabilities, damages or debts incurred by the wife prior to marriage;" and in June of the same year suit was brought on the note against the wife and husband, and judgment was rendered against both, from which they appealed, claiming that the law had removed the husband's liability, and in this they were sustained by the court of appeals. The court concludes from the language of the statute, which is given above, that the evident intention of the legislature was, that the law should have an immediate effect upon existing marriages; and then proceeds to investigate the

[1] Laws of Mo., 1881, p. 161.
[2] Const. of Mo., art. ii., sec. 15.
[3] Berley v. Rampacher, 5 Duer. 183.
[4] Fultz v. Fox, 9 B. Mon. 499.

question whether such a law is unconstitutional, as impairing the obligation of contracts, or divesting or destroying vested rights. Upon this question, Judge Simpson says: "As the law stood previous to the passage of the act, the debt of a *feme sole* was not, on her marriage, considered as transferred to her husband. If it had been, he or his executor would have been liable after the termination of the coverture. * * * * The contract was the contract of the wife, and not of the husband, and therefore the law exempting his estate from the payment of the debt can not be regarded as having the effect of impairing the obligation of the contract." And again: "The principle upon which he was liable for the debts of the wife, was not that he was entitled to her property, or that she was considered unable to pay her debts in consequence of her property having passed to her husband. * * * * The reason for holding the husband liable originally was, the debtors being liable to imprisonment for the non-payment of a debt, the wife could not be imprisoned upon civil process, without her husband, it therefore became necessary that he be joined in the suit with the wife, that judgment might be rendered against them both. * * * The protection of the wife, and not the advantage of the creditor, was the true foundation of the husband's liability. * * * * Considering the object of the law in subjecting the husband to this liability, and its adventitious, contingent and limited character, its existence would not seem to create such a right in the creditor as to forbid a change in the law on the subject, even when the liability, as in the present case, existed at the time when the change was effected."

Thus it is seen that these two courts, under laws exactly similar, in substance, to the Missouri law, have given decisions diametrically opposed to each other. Mr. Bishop quotes Judge Simpson's opinion with approval;[5] while there is a case in South Carolina which seems to stand on the New York rule. In that case,[6] the debt had been contracted and the woman married, before any changes were made in the law. Before this suit was brought, the Constitution had deprived the husband of all his rights in the wife's property, but made no changes as to his liability for her debts. Suit was brought against husband and wife, pending which the legislature passed a law re-enacting the constitutional provision, and adding a proviso, "that the husband shall not be liable for the debts of the wife contracted prior to, or after their marriage." This was urged as releasing the husband's liability; but the court decided the case upon equitable grounds, holding the husband liable. They say: "The plain object in view was to equalize the rights and liabilities of the husband, which equality had been disturbed by the constitutional provision."[7] The court did not go into any examinination of the principles of the law, and neither of the above cases seem to have been considered. In this diversity of opinion, it would appear that the position of the Kentucky Court is the better supported by the authorities. The whole difference between the New York rule and the Kentucky rule seems to turn upon the one point, wherein the New York Court says of the creditor's right after marriage: "The husband, as well as the wife, was then his debtor;" and the Kentucky Court says: "The debt of a *feme sole* was not, on her marriage, considered as transferred to her husband." In this, the authorities are on the side of the Kentucky Court. The husband was not regarded by the law as the debtor;[8] but the debt continued after marriage to be the debt of the wife, and the husband was not considered in any way liable for it unless a judgment therefor was had against him during the existence of the marital relation.[9] On the contrary, the law does not consider that there is sufficient obligation resting upon him in regard to the debt to even support a promise made by him to pay it; and such a promise made by him, without any additional consideration, either during coverture or after, is regarded as void for want of consideration.[10] The true view, as given by Bishop,[11] is: "That the law does not lay upon the husband the duty to pay the wife's

[5] 2 Bish. on Law of Married Women, sec. 52.
[6] Clawson v. Hutchinson, 11 S. C. 323.

[7] See, also, Zachary v. Cadenhead, 40 Ala. 236.
[8] Cole v. Shurtleff, 41 Vt. 311.
[9] Lamb v. Belden, 16 Ark. 539; Bryan v. Doolittle, 38 Ga. 255; Buckner v. Smyth, 4 Desaus. 471; Witherspoon v. Dubose, 1 Bailey (S. C.) Ch. 166; Day v. Messick, 1 Houst. (Del.) 328.
[10] Waul v. Kirkman, 13 Sm. & M. 599; Hetrick v. Hetrick, 13 Ind. 44.
[11] 2 Bish. on Law of Married Women, sec. 312.

ante-nuptial debts in consideration of the marriage, or in consideration of property received from her, or in consideration of anything else; but, on the other hand, that the obligation comes from the rule of practice which forbids the wife to be sued alone, and requires the joinder of the husband with her as defendant, 'for conformity.'" [12] This being true, it is difficult to see how a law removing this obligation would impair the obligation of any contract, or that it would be "retrospective in its operation," in the constitutional sense. But the question is an open one, and a judicial decision in this State will be looked for with interest.[13]

E. G. TAYLOR.

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[12] See Cannon v. Grantham, 45 Miss. 88.

[13] See Cunningham v. Gray, 20 Mo. 170; Tally v. Thompson, 20 Mo. 277; Harvey v. Wickham, 23 Mo. 112; Barber v. Wimer, 27 Mo. 140.

DAMAGES FOR ASSAULT—PUNITIVE AND COMPENSATORY—REMITTITUR.

CORCORAN v. HARRAN.

Supreme Court of Wisconsin.

1. It is the settled law of this State that while proof of a defendant's good faith is admissible to mitigate punitory damages, it can not be considered to mitigate compensatory damages, including those allowed for injury to the feelings.

2. A general exception to a portion of the charge, embracing more than one proposition, is of no avail on review, if any one of the propositions is correct.

3. Where an exception to a portion of a charge expressly states the ground upon which it is made, it must be treated as a special exception upon the ground stated; and where such exception is stated to be upon one ground which can not be sustained, it will not be enlarged and extended so as to serve as an exception upon another and different ground which might have been sustained.

3. Where an exception is to a portion of a charge quoted, and to each and every part thereof, upon a particular ground specified, it will be held inoperative except as to the ground particularly specified.

4. The jury are bound by their oaths to regard what is said to them by the court in the charge as having reference only to the case and the evidence given therein on the trial before them, and if a party desire more definite instructions he should request them, and if he do not he can not be heard to complain that the portion of the charge given was indefinite and uncertain.

5. The imposition of a fine in a criminal proceeding for assault and battery will not bar or mitigate the party's liability to exemplary damages in a civil suit for the same act.

6. In actions of tort, as well as contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and in case he does so order the verdict to stand for the residue.

7. But this power is very sparingly used, and never except in a close case; for to authorize such interference it should appear from the evidence that the damages are so excessive as to create the belief that the jury have been misled, either by passion, prejudice or ignorance.

8. A party against whom a judgment has been recovered can not reverse it, on the ground that it was less than it should have been.

Appeal from the Circuit Court of Kewaunee County.

Tracy & Bailey, for respondent; *Hudd & Wigwam*, for appellant.

This is an action for damages for injuries to the plaintiff personally, by reason of an alleged assault and battery by the defendant. Upon issue joined and trial had in justice court, the plaintiff recovered judgment of $100 damages and costs. Upon the trial in the circuit court on the appeal, the jury returned a verdict of $200 damages in favor of the plaintiff. The circuit court granted the defendant's motion for a new trial, unless the plaintiff would reduce the amount of the verdict to $100. Accordingly the plaintiff remitted $100 of the verdict, and the court thereupon denied the motion for a new trial and gave judgment in favor of the plaintiff and against the defendant for $100 damages and costs, from which judgment the defendant brings this appeal.

CASSODAY, J., delivered the opinion of the court:

1. It is urged as error, that the court, among other things, charged the jury, that: "Personal abuse which may have had something to do with inducing and bringing upon another an assault, may be considered by a jury in mitigation of damages. But a man commencing an assault and battery under such circumstances, is liable for the actual damages which result from such an assault. The abusing words are no justification for the blows and may be considered, as I have said, in mitigation of damages, but not actual damages." This portion of the charge is clearly within the rule recognized and followed in Fenelon v. Butts, 10 N. W. R. 501; s.c., 4 Wis. L. N. 93, where it was held, that: "6. It is the settled law of this State that, while proof of defendant's good faith is admissible to mitigate punitory damages, it can not be considered to mitigate compensatory damages, including those allowed for injury to the feelings."

2. It is also urged as error, that the court, among other things, charged the jury, that: "In this case the plaintiff must recover. The only question which you have further to consider, is how much, under the circumstances, shall it be? He is entitled to recover, first, the actual damage

which the evidence shows he has sustained for his loss of time, and the pain and sufferings, which were the result of such assault; and second, in addition to such actual damages, such sum as, in your judgment, is reasonable and just, by way of punishment, as an example to the defendant and others, to deter him and others from committing such act." Had this portion of the charge been excepted to on the ground that the court directed the jury to give the plaintiff punitive damages in addition to actual damages, we probably would have sustained it, but no such exception was taken. The language used in the exception is this: "The defendant excepts to so much of the charge as reads (here quoting the same) and each and every part thereof, because it is very improper in not distinguishing pain and suffering from the actual damage, and in the effect of the same, this further damage, viz: pain and suffering, defendant could not have the benefit of the mitigating circumstances if any existed."

So far as this exception is general in its terms, it must be disregarded for the simple reason that the portion of the charge quoted which relates to actual damages was substantially correct, and it is well settled that a general exception to a portion of a charge embracing more than one proposition, is of no avail on review if any one of the propositions is correct. Butler v. Carns, 37 Wis. 61; Sabine v. Fisher, 37 Wis. 376; Nisbet v. Gill, 38 Wis. 657. But this exception is based wholly on the ground that the court failed to distinguish pain and suffering from actual damage, and thereby prevented the defendant from having the benefit of reducing the amount of the damages, arising from pain and suffering by mitigating circumstances. But that is the very question determined adversely to the defendant in Fenelon v. Butts, *supra*. It is there held that they are not distinguishable. We must, therefore, hold, that where an exception to a portion of a charge expressly states the ground upon which it is made, it must be treated as a special exception upon the ground stated; and where such exception is stated to be upon one ground which can not be sustained, it will not be enlarged and extended so as to serve as an exception upon another and different ground which might have been sustained. Miles v. Ogden, unreported. 4 Wis. L. N., weekly, p. 273; daily, No. 191.

Where an exception is to a portion of a charge quoted, and to each and every part thereof, upon a particular ground specified, it will be held inoperative except as to the ground particularly specified. Yates v. Bachley, 33 Wis. 185.

3. The same observations are applicable to the third exception to a portion of the charge; and particularly to the fourth exception to a portion of the charge, which may have been subject to the objection of directing punitive damages in addition to compensatory damages, had the same been excepted to on that ground. Each of these two portions of the charge may each be regarded as somewhat general in its terms, but we do not think that either is obnoxious to the criticism that it gave the jury liberty to find a verdict according to their own notions of right and wrong, regardless of the evidence in the case. On the contrary, we think the jury were bound by their oaths to regard what was said to them by the court in his charge as having reference only to the case and the evidence given therein on the trial before them. Certainly if the defendant desired more definite instructions he should have so requested, and, not having done so, he can not be heard to complain without exception, on the ground that the portion of the charge given was indefinite and uncertain. Trowbridge v. Sickler, 11 N. W. R. 581; S. C. Wis. L. N. 221; Stilling v. Town of Thorp, 4 Wis. L. N. 257; s. c., 11 N. W. R. 906. It is true, as stated by counsel, that the court no where told the jury that punitive damages might be wholly defeated, but it is also true that the court was not requested so to charge, and hence, for the reasons given, such omission is not ground for reversal.

4. The court had charged the jury that: "The fact that fines have been imposed, and he (the defendant) has been punished by the State, may be taken into consideration by the jury in mitigation of the damages," and counsel urge that the portion of the charge respecting punitive damages, left it doubtful where the reduction would come in for fines and punishment already had for the same offense. But as already indicated, the best method of preventing the jury from being misled by a doubtful portion of a charge, is to request an instruction upon the subject which is not doubtful. Besides, it has been held by courts entitled to great respect, that: "The imposition of a fine in a criminal proceeding for assault and battery, will not bar or mitigate the party's liability to exemplary damages in a civil suit for the same act." Hoodley v. Watson, 45 Vt. 289; Cook v. Ellis, 6 Hill, 466; McWilliams v. Bragg, 3 Wis. 424; Brown v. Swineford, 44 Wis. 282. This ruling, however, is merely suggested, as the question is not necessarily before us for consideration.

5. Should the judgment be reversed because the plaintiff, on the defendant's motion for a new trial for excessive damages, was allowed to remit one hundred dollars from the amount of the verdict, and have judgment for the balance with costs? In urging that the court had no such power, counsel cite, among other cases, Potter v. Railroad, 22 Wis. 619; Goodno v. Oshkosh, 28 Wis. 306; Nudd v. Wells, 11 Wis. 415. In Potter v. Railroad, the trial court refused to set aside the verdict, and this court was asked to allow the plaintiff to remit whatever should be deemed an excess of damage, but it declined to exercise any such power, and sent the cause back for a new trial with certain advisory remarks. The same course was followed in Goodno v. Oshkosh. See also Bass v. Railroad, 39 Wis. 636; Page v. Sumpter, 11 N. W. R. 60; Cassin v. Delaney, 38 N. Y. 178. But that question is not in this case, for here the deduction was allowed by the trial court.

The right to allow such deduction in cases where the amount could be readily ascertained from the evidence with certainty, would not, we presume, be questioned; but whether the power exists in actions of tort where the amount which should be deducted can not be ascertained with any degree of certainty, is a question upon which the authorities are by no means uniform. Nudd v. Wells, *supra*, was an action against an express company to recover damages for the non-delivery of a box of machinery, and the plaintiff obtained a verdict of $1,087, and on motion to set aside the verdict and for a new trial, the same was granted, unless the plaintiff consented to reduce the verdict to $821.21, which he did and judgment was entered thereon accordingly, and the defendant appealed to this court. In giving the opinion of the court, Mr. Justice Paine said: "The practice of remitting where the illegal part is clearly distinguishable from the rest, and may be ascertained by the court without assuming the functions of the jury and substituting its judgment for theirs, is well settled. * * * But it ought not to be carried so far as to allow the court, when a jury has obviously mistaken the law, or the evidence and rendered a verdict which ought not to stand, to substitute its own judgment for theirs, and after determining upon the evidence which amount ought to be allowed, allow the plaintiff to remit the excess, and then refuse a new trial." And then after conceding that there were two authorities (Collins v. Railway, 12 Barb. 492, and Clapp v. Railway, 19 Barb. 461), sustaining that view, and expressing some doubt as to whether there was any evidence that the value was the precise sum named by the court, he continued: "But without determining whether the court might properly have done this (determine the true value of the machine) consistently with the rule above laid down, we think it was mistaken in the rule of damages which it finally allowed." Thereupon the court reversed the cause upon other grounds, and hence the question suggested was not determined. In Blunt v. Little, 3 Mason, 102, the plaintiff obtained a verdict of $2,000 in an action for malicious arrest, and on motion for a new trial on the ground that the damages were excessive, Mr. Justice Story, before whom the cause was tried, said: "After full reflection I am of opinion that it is reasonable that the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages. If he does, the court ought not to interfere farther." Page 107. A similar practice was followed in Diblin v. Murphy, 3 Sandford, 19; Collins v. Railway, 12 Barb. 492; Clapp v. Railway, 19 Barb. 461; Murray v. Railway, 47 Barb. 196; McIntyre v. Railway, 47 Barb. 515; Sears v. Connover, 3 Keyes, 113; Hayden v. Co., 55 N. Y. 521; Whitehead v. Kennedy, 69 N. Y. 462; Doyle v. Dixon, 97 Mass. 208; Woodruff v. Richardson, 20 Conn. 238; Jewell v. Gage, 42 Me. 247; Belknap v. Railroad, 49 N. H. 358; Town of Union v. Durkes, 38 N. J. L. 23; Yeager v. Weaver, 64 Pa. St, 425; Pendleton Street Ry. Co, v. Rahmann, 22 Ohio St. 446; I. C. R. R. Co. v. Ebert, 74 Ill. 398; Lombard v. Railway, 47 Iowa, 494; Collins v. Council Bluffs, 35 Iowa, 432; Kinsey v. Wallace, 36 Cal. 462; Guerry v. Kertan. 2 Richardson, 507; Young v. Englehard. 1 How. (Miss.) 19; Davidson v. Molyneux, 17 L. T. R. 289. These cases were mostly actions for torts. In some of them the reduction was allowed by the appellate court, but that would seem to be extending instead of limiting the rule. The reasoning in some of these cases would seem to be unanswerable. We shall make no attempt to add anything. The practice adopted by the trial judge is clearly sanctioned by the great weight of authority. We must, therefore, hold that in actions of tort, as well as contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and in case he does so, order the verdict to stand for the residue. Certainly the practice will tend to promote justice and lessen the expense to litigants and the public. Besides, the allowance of such option is no more of an exercise of arbitrary power by the trial judge, than it would be for him to set aside the verdict absolutely upon the sole ground that it is excessive, and then, in effect, direct a jury to bring in a verdict for a smaller sum, but not in excess of an amount named by the court. But we are unwilling to say that the verdict, as returned in this case, was so excessive as to authorize the interference of this court. To authorize such interference, it should appear from the evidence, to use the language of Mr. Sedgwick, that "the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice or ignorance. But this power is very sparingly used, and never except in a clear case." 2. Sedg. on Dam. (601), 652. See Bowe v. Rogers, 30 Wis. 602. Since this is so, it is evident that the reduction was a favor to the defendant of which he has no right to complain. Certainly a party against whom a judgment has been recovered, can not reverse it on the ground that it is less than it should have been. Bammessel v. Ins. Co., 42 Wis. 463. Even in case of error, the judgment will not be reversed unless the error is such as might have prejudiced the appellant. Jones v. Parish, 1 P. 494; Green v. Gilbert, 21 Wis. 395; Balliet v. Scott, 32 Wis. 174; Irish v. Dean, 39 Wis. 562.

For the reasons given the judgment of the circuit court is affirmed.

ACTIONS OF TORT—REMOTE DAMAGES.

HUGHES v. McDONOUGH.

Supreme Court of New Jersey.

One is answerable in tort for the natural and reasonable consequences of his acts.

The plaintiff is a blacksmith and horse-shoer by trade, and has, as he alleges, the patronage of one Van Riper. On one occasion he shod a mare for Van Riper in a good and workmanlike manner, but the defendant maliciously intending to injure the plaintiff in his said trade, etc., "did willfully and maliciously mutilate, impair and destroy the work done and performed by the said plaintiff upon the mare of the said Van Riper, without the knowledge of the said Van Riper, by loosening a shoe which was recently put on by the said plaintiff, so that if the mare was driven the shoe would come off easily, and thus make it appear that the said plaintiff was an unskillful and careless horse-shoer and blacksmith, and that the said mare was not shod in a good and workmanlike manner, and thus deprive the said plaintiff of the patronage and custom of the said Van Riper." The second count charges the defendant with driving a nail in the foot of the horse of Van Riper after it had been shod by the plaintiff, with the same design as specified in the first count. The special damages laid was the loss of Van Riper as a customer. On writ of error taken by defendant.

BEASLEY, C. J., delivered the opinion of the court:

The single exception taken to this record is, that the wrongful act alleged to have been done by the defendant, does not appear to have been so closely connected with the damages resulting to the plaintiff as to constitute an actionable tort. The contention was that the wrong was done to Van Riper; that it was his horse whose shoe was loosened and whose foot was pricked, and that the immediate injury and damage were to him, and that consequently the damages of the plaintiff were too remote to be made the basis of a legal claim. But this contention involves a misapplication of the legal principle, and can not be sustained. The illegal act of the defendant had a close causal connection with the hurt done to the plaintiff, and such hurt was the natural and almost direct product of such cause. Such harmful result was sure to follow in the usual course of things, from the specified malfeasance. The defendant is conclusively chargeable with the knowledge of this injurious effect of his conduct, for such effect was almost certain to follow from such conduct, without the occurrence of any extraordinary event or the help of any extraneous cause. The act had a twofold injurious aspect; it was calculated to injure both Van Riper and the plaintiff; and as each was directly damnified, I can perceive no reason why each could not repair his losses by an action.

The facts here involved do not, with respect to their legal significance, resemble the juncture that gave rise to the doctrine established in the case of Vicars v. Wilcocks, 8 East, 1. In that instance the action was for a slander that required the existence of special damage as one of its necessary constituents, and it was decided that such constituent was not shown by proof of the fact that as a result of the defamation the plaintiff had been discharged from his service by his employer before the end of the term for which he had contracted. The ground of this decision was, that this discharge of the plaintiff from his employment was illegal and was the act of a third party, for which the defendant was not responsible, and that as the wrong of the slander became detrimental only by reason of an independent wrongful act of another, the injury was to be imputed to the last wrong, and not to that which was farther distant one remove. In his elucidation of the law in this case, Lord Ellenborough says, alluding to the discharge of the plaintiff from his employment, that it "was a mere wrongful act of the master for which the defendant was no more answerable than if, in consequence of the words, other persons had afterward assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his supposed transgression." The class of cases to which this authority belongs rests upon the principle that a man is responsible only for the natural consequences of his own misdeeds, and that he is not answerable for detriments that ensue from the misdeeds of others. But this doctrine, it is to be remembered, does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties, for in such instances damage is regarded as occasioned by the wrongful cause, and not at all by those which are not wrongful. Where the effect was reasonably to have been foreseen, and where, in the usual course of events, it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences. This principle is stated and is illustrated by a reference to a multitude of decisions in Cooley on Torts, 70 *et seq.*

The case of McDonald v. Snelling, 14 Allen, 290, is pertinent to this point, and also to the circumstances that a wrongful act which is primarily detrimental to one person may, under some conditions, be actionable by a third person, to whom, more remotely, damage has been occasioned. The rule of decision is stated in these terms: "Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties; but where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured whose injury is the natural and probable consequences of the misconduct. In our opinion this is the well established and ancient doctrine of the common law, and such a liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act." This same rule of law is sanctioned and enforced in Rigby v. Hewitt, 5 Exch. 242, Chief

Baron Pollock saying: "I am, however, disposed not quite to acquiesce to the full extent in the proposition that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct." Judge Parsons expresses the rule almost in these same terms. 2 Parsons on Cont., 456. In this same line there are many other illustrated cases, among which should be specially noted the following: Dixon v. Fawcus, 30 L. J. Q. B. 137; Tarleton v. M'Gawley, Peake, 270; Bell v. R. Co., 10 C. B. (N. S.) 307; Keeble v. Hickeringill, 11 East, 574, note.

Judgment affirmed.

COMMON CARRIERS — PASSENGER'S TICKET — LIMITED AS TO TIME—CONTINUOUS JOURNEY.

AUERBACH v. NEW YORK CENTRAL, ETC. R. CO.

New York Court of Appeals.

1. Where it is expressed in terms upon a railway ticket that it is not good unless "used" on or before a certain day, a presentation of the ticket and its acceptance of it by the conductor before midnight of that day, although the journey is not completed until the next morning, such facts will be held to be a compliance with the condition.

2. Where the terms of a railway ticket bind the passenger to a continuous journey, such requirement is fulfilled if the passenger commences his journey at an intermediate point.

EARL, J., delivered the opinion of the court:

This action was brought by the plaintiff to recover damages for being ejected from one of the defendant's cars while he was riding therein as a passenger. He was non-suited at the trial, and the judgment entered upon the non-suit was affirmed at the general term. The material facts of the case are as follows:

The plaintiff being in St. Louis on the 21st day of September, 1877, purchased of the Ohio & Mississippi Railway Company a ticket for a passage from St. Louis, over the several railroads mentioned in coupons annexed to the ticket, to the City of New York. It was specified on the ticket that it was "good" for one continuous passage to point named "in coupon attached;" that in selling the ticket for passage over other roads, the company making the sale acted only as agent for such other roads and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of September then instant, and that if he failed to comply with such agreement, either of the companies might refuse to accept the ticket or any coupon thereof and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket, and rode to Cincinnati and stopped there a day. He then rode to Cleveland and staid there a few hours, and then rode to Buffalo, reaching there on the 24th, and stopped there a day. Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language upon that coupon is as follows: "Issued by the Ohio & Mississippi Railway on account of New York Central & Hudson River Railroad one first-class passage, Buffalo to New York."

Being desirous of stopping at Rochester the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September he entered one of the cars upon the defendant's road to complete the passage to the City of New York. He presented his ticket with the one coupon attached to the conductor, and it was accepted by him and was recognized as a proper ticket, and punched several times until the plaintiff reached Hudson, about three or four o'clock A. M., September 27th, when the conductor in charge of the train declined to recognize the ticket, on the ground that the time had run out, and demanded three dollars fare to the City of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge non-suited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The general term affirmed the non-suit, upon the ground that although the plaintiff commenced his passage upon the 26th of September he could not continue it after that date on that ticket.

We are of the opinion that the plaintiff was improperly non-suited. The contract at St. Louis evidenced by the ticket and coupons there sold was not a cantract by any one company or by all the companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company, through the agent selling the ticket, made a contract for a passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence, the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it

can not complain of the stoppages at Cincinnati and Cleveland. Hutchinson on Carriers, sec. 579; Brooks v. The Railway, 15 Mich. 332.

But the plaintiff was bound to a continuous passage over the defendant's road—that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and there made it continuous. The language of the contract, and the purpose which may be supposed to have influenced the making of it do not require a construction which make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo and ride only from Rochester or Albany. The purpose was only to continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff having the right to enter a train at Buffalo, it can not be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.

When the plaintiff entered the train at Rochester on the afternoon of the 26th of September and presented his ticket and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned it had then performed its office. It was thereafter left with him not for his convenience but under regulations of the defendant for its convenience that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the ticket should be used on or before that day, and that it was so used seems to us too clear for dispute.

The language printed upon the ticket must be regarded as the language of the defendant, and it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually commence at Buffalo and be continuous to the City of New York, or that the passage should be completed on or before the 26th of September, such intention should have been plainly expressed and not left in doubt as might and naturally would mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur; ANDREWS, C. J., in result; TRACY, J., absent.

NUISANCE — PRIVATE STABLE — SPECULATIVE INJURY—INJUNCTION.

ROUNSAVILLE v. KOHLHEIM.

Supreme Court of Georgia, February Term, 1882.*

1. While a private stable in a city is not *per se* a nuisance, still it may be so kept and managed as to become one, and one who builds and maintains such a stable upon his own premises so near his dividing line that it is in danger of disturbing the adjacent property owners, does so at his own peril, and must guard against such result.

2. An injunction will not lie to restrain a course of action from which speculative or contingent injuries may result.

Refusal of injunction from Floyd Superior Court.

CRAWFORD, J., delivered the opinion of the court:

A bill was filed to enjoin the defendant from building a private stable on his own lot, in the City of Rome, adjoining that of the complainants. The grounds for the application of the injunction were that large quantities of litter, manure and filth will be gathered in said stable; that swarms of flies and other vermin will be generated therein; that noxious vapors and foul stenches will be generated; that there will be an eternal stamping of horses and lowing of cattle in said stable, and if the defendant is permitted to locate and use said stable at the place upon which he proposes to build it, the injury to the property of complainants will be irreparable. The bill was dismissed at the hearing for want of equity.

The only question for this court to decide is, Was the dismissal of the bill error? It was ruled in 9 Ga. 425, "That a livery stable within sixty-five feet of a hotel which would result in the loss of health and comfort of the proprietor's family, and the loss of patronage to his hotel in consequence of the unhealthy effluvia arising therefrom and the collection of swarms of flies, and the interminable stamping of horses therein would operate as a nuisance, and that the landlord was entitled to an injunction to restrain the erection." This ruling was made upon the refusal of the chancellor below to grant an injunction restraining the erection of the building. Upon the coming in of the answer in the case, denying the main allegations in the bill, and setting up the fact of a removal of the plank floor, and that by the use of lime water, and keeping the stalls neat and clean, as well as other precautionary measures, there would be no damage to the complainant resulting from said stable, the chancellor dissolved the injunction.

This ruling by the chancellor brought the case again before this court, as may be seen in 10 Ga. 336, and it was there held, "That the *ad interim*

* This case was argued at the last term and decision reserved.

injunction should not have been removed, but should have been continued to the final hearing." Further, that "if, upon the hearing, the jury should be of opinion that this stable with its inmates and attendants is not a nuisance of itself, but that it may be kept in such manner as to make it unobjectionable, they will no doubt require that it shall be kept in this manner, or provide adequate protection to the complainant." This same subject of building a livery stable again came before this court on the granting of an injunction to restrain its erection, and is reported in 20 Ga. 537. It was there held that to enjoin nuisances in the course of erection, the evil sought to be remedied must not be "merely probable, but certain;" and Lumpkin, C. J., in the opinion adds "inevitable." And further, that if "the establishment were properly kept, that instead of being certain that the stable would be a nuisance, the probability is that it would not be." This brings the rule where we think the law puts it, that livery stables may be so located as to become nuisances; and so may any private stable be located with reference to the dwellings, or places of business of others, and be so improperly kept and conducted as to become an actionable nuisance. But the mere probability that it will become so, is insufficient to deprive the owner of a lot, of the right to erect a stable for his own use, although it may be on the line of his lot, and quite near the dwelling of an adjacent owner. It is true that he who thus builds must, at his peril, guard against such construction as that its ordinary use would disturb adjacent owners by the noises produced, or manage it in such a way as not to permit offensive stenches to emanate therefrom and float over his neighbor's premises to his serious annoyance and discomfort. Although there are variations in the different courts in the manner of stating the law, we think that this is the proper legal rule on the subject, as well as that it is the most general one adopted. Wood on Nuis., secs. 526-7-8-9.

It was ruled by the Supreme Court of Texas, in Burdett v. Swanson, 17 Tex. 489: "It would seem that a livery stable in a town is not necessarily or *prima facie* a nuisance, but that it depends on whether from the manner in which it is either built, kept or used it destroys the comfort of persons owning adjoining premises, or impairs the value of their property." In Iredell, 244, it was held that a stable in a town is not like a slaughter pen or a hog stye, necessarily or *prima facie* a nuisance, though in itself it be a convenient and lawful erection." In 11 Humph. 407, the court say, that "a livery stable in a town is not necessarily a nuisance in itself, and therefore a court of equity has no jurisdiction to restrain by injunction, either the completion of a building because intended for that purpose, nor its appropriation to the use intended." In the case of Earl of Ripon v. Hobart, 3 Mylne & Keene, cited 2 Story's Eq., sec. 924, note 1, Lord Brougham says, that "no instance can be produced of the interposition of courts of equity by injunction in the case of an eventual or contingent nuisance." If, then, this be the law in reference to livery stables, the right to build a private one should not be denied, and especially so upon the apprehension that it will become a nuisance. In this case all the allegations, except the mere location, are speculative and contingent; the bill was therefore without equity, and should have been dismissed. Whilst the building of this stable may not be a kindly or neighborly act, yet with this the courts have nothing to do; they are simply to decide whether in itself it is an unlawful one, and therefore to be suppressed. To hold that there is equity in this bill is to hold, that the building of a private stable on one's own lot is *per se* a nuisance, and that an adjacent owner may dictate its location upon some other part of the lot, because he has seen fit to build his own house within nine feet of the line. To send it to the jury would be for them to pass on that which does not yet, and may never, exist; that is, whether the manner in which it is to be used, or the manner in which it is to be kept will make it a nuisance.

Judgment affirmed.

JACKSON, C. J., concurring, said that if one who has sufficient room, and can without injury to himself locate a stable elsewhere than in immediate proximity to his neighbor's premises, where it will be offensive to the latter, equity will restrain him from so locating it. I concur in the decision on the ground that it does not appear that the defendant could locate the stable elsewhere as well as where he was proceeding to place it.

WEEKLY DIGEST OF RECENT CASES.

1. ABATEMENT—BREACH OF PROMISE—DEATH OF DEFENDANT.

An action for damages for breach of promise to marry does not abate upon the death of the defendant, *Allen v. Baker*, S. C. N. C., 1 Am. Law Mag., 191.

2. ADMIRALTY—LIMITATION OF LIABILITY—PRACTICE.

The owner of a vessel may institute appropriate proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability

provided by statute, without waiting for a suit to be begun against him or his vessel for the loss out of which the liability arises. *Ex parte Slayton*, U. S. S. C., Md. Law Rec., July 1, 1882.

3. ATTORNEY AND CLIENT—EXTENT OF AUTHORITY—COMPROMISE OF ACTION.

An attorney at law can not, by virtue of his general retainer and authority, accept in satisfaction of a judgment he has obtained for a client, a less sum than is really due, binding the client. *Robinson v. Murphy*, S. C. Ala.

4. BREACH OF MARRIAGE PROMISE — VENEREAL DISEASE.

Where defendant failed to perform such contract upon the ground that he was afflicted with a disease which rendered him unfit for the married state, it was *held* that he would be answerable in damages if the disease was contracted subsequently to the time of making the promise, or if before, and he knew his infirmity was incurable; but if it was contracted prior to the promise and he had reason to believe it to be temporary only, he is excusable for a breach resulting from a knowledge afterwards acquired that it was of long duration. *Allen v. Baker*, S. C. N. C., 1 Am. Law Mag., 191.

5. CHATTEL MORTGAGE — SUBSEQUENT ACQUISITIONS.

A mortgage of furniture then in a dwelling house, and of that afterwards to be purchased, conveys a valid title to that only of which the mortgagor was then the owner. The mortgage being void as to after-acquired property a mere delivery of the same by the mortgagor to the mortgagee, the former retaining the possession and control, does not transfer a valid title as against attaching creditors. In such a case the mortgagee can not hold the subsequently purchased property as against attaching creditors, because the mortgage when recorded did not embrace it. He can not hold it as a pledge because he did not retain the possession. *Griffith v. Douglas*, S. C. Me., May 31, 1882, Reporter's Advance Sheets.

6. COMMON CARRIER—RIGHTS OF COLORED PASSENGER HOLDING A FIRST-CLASS TICKET.

A colored lady who had purchased and held a first-class ticket was entitled to admission into the ladies' car, if there was room for her therein; and if she was refused admission and the railroad company declined to carry her except in the smoking car, containing only men, some of whom were smoking, she had a right to decline such accommodations, and it is liable to her in damages. *Gray v. Cincinnati Southern R. Co.*, U. S. C. C., S. D. Ohio, April 18, 1882, 11 Fed. Rep., 683.

7. CONTRACTS—"FUTURES"—WAGERS.

Whatever may be the form of the contract, if from the nature of the transaction and the circumstances surrounding it, it is apparent that the purpose is not to buy or sell the goods, and that no delivery of them is intended, but that at the time appointed for delivery the transaction should be closed upon the basis of the then market price of the goods, the losing party paying the difference, even though there be no statute denouncing it, such contract is void. *Hawley v. Bibb*, S. C. Ala.

8. CONTRACT—UNDUE INFLUENCE — ASSIGNMENT BY PERSON OF FEEBLE MIND.

Where a person feeble in mind and body and incapable of exercising control over his property, or of managing it in a prudent, careful manner, or of making any contract in reference thereto, was unduly influenced to purchase an interest in a patent right of doubtful utility, and in consideration therefor to assign notes and a mortgage on real property to the defendant, *held*, that such assignment is void, and transfers no title to the assignee. *Colburn v. Van Velzer*, U. S. C. C., D. Minn., May, 1882, 11 Fed. Rep., 795.

9. CORPORATION — CONTRACT — "CONTROL" OF A CORPORATION.

Where a railroad company made a contract concerning all roads which it then did or might thereafter control, by ownership, lease or otherwise, and thereafter acquired more than a majority of the stock of B, another railway company, and by voting such stock elected B's board of directors; and where certain persons were members of the board of directors of both A and B, and the same persons were respectively presidents and vice-presidents of both companies, *held*, that A had not acquired "control" of B, within the meaning of the terms of the contract, and that the word "control," as used in said contract, meant an immediate or executive control exercised by the officers and agents chosen by and acting under the direction of A's board of directors. *Pullman Palace Car Co v. Mo. Pac. Ry. Co.*, U. S. C. C., E. D. Mo., April 25, 1882, 11 Fed. Rep., 634.

10. CORPORATION—POWER OF STOCKHOLDER TO ENFORCE CORPORATE RIGHT.

Where the legislature of a State has repealed the charter of a street railroad company, and transferred its franchises and track to another, and the corporation refuses to seek a remedy in the courts, a stockholder of the company will have a standing in a court of equity, who asks an injunction on the ground that the repealing statute impairs the obligation of a contract. *Greenwood v. Union Freight Ry. Co.*, U. S. S. C., January 9, 1882, 6 Va. L. J., 410.

11. CRIMINAL LAW — PERJURY — EXTRA-JUDICIAL OATH.

Perjury can not be assigned upon an extra-judicial oath. So, where the law does not require a proceeding to be sworn to, an indictment for perjury will not lie, even if the affidavit on which it is predicated is false. *Linn v. Commonwealth*, S. C. Pa., 14 Ch. Leg. N. 332.

12. CRIMINAL LAW—PRESENCE OF DEFENDANT.

Where the record fails to show affirmatively that the defendant was personally present in court when a day was fixed for trial and an order was made for summoning a special *venire*, this court will not presume that he was so present, and will reverse the judgment of the lower court. The failure of the prisoner to make the objection in the lower court does not waive the irregularity. *Sylvester v. State*, S. C. Ala., 1 Ala. L. J., 134.

13. CRIMINAL LAW—UNITED STATES MAIL—"INDECENT" MATTER.

The term "indecent" in section 3893 of the Revised Statutes, in connection with the offense defined in said section of mailing any book, letter, envelope, postal card, etc., containing any indecent, etc., delineations, epithets, etc., either written or printed, taken with the history of the legislation upon the subject, means immodest, impure; and language which is coarse or unbecoming, or even profane, is not within the inhibition of the act. *United States v. Smith*, U. S. C. C. D. Ky., 11 Fed. Rep., 663.

14. DAMAGES—MEASURE OF DAMAGES FOR WRONGFUL EXCLUSION FROM CARS.

In an action against a railroad company to recover

damages for wrongful exclusion from its cars, in which it appeared that the plaintiff, a colored lady, purchased and held a first-class ticket at the time she applied for admission to the ladies' car; that she was lady-like in appearance and conduct, and was at the time carrying a sick child in her arms; and that the company refused to carry her except in the smoking car, in which were men only, some of whom were smoking; whereupon she left the cars: *Held*, that she was entitled to such damages as would make her whole, and the jury should consider the loss of time and inconvenience she had been put to, and the proper amount of expenses incurred in the vindication of her rights. *Gray v. Cincinnati Southern R. Co.*, U. S. C. C., S. D. Ohio, April 18, 1882, 11 Fed. Rep., 683.

15. EQUITY—ASSIGNMENT OF A PART OF A CHOSE IN ACTION.

The assignment of a part only of an entire demand or chose in action, is valid in equity, so as to be upheld in a court of equity, against the consent of the person owing the demand assigned, in all cases where just and equitable results may be accomplished thereby. *National Exchange Bank v. McLoon*, S. C. Me., May 29, 1882, Reporter's Advance Sheets.

16. EQUITY — BOND AND MORTGAGE — INNOCENT HOLDER FOR VALUE.

Parker and wife were indebted to Lamb. Lamb had in his hands money belonging to Etheridge, which he, Lamb, wanted to get the use of. He thereupon informed Etheridge that he could lend this money out at large interest, well secured, which Etheridge authorized him to do. Lamb then obtained from Parker and wife their bond, payable to him at twelve months, and a deed of trust on Mrs. P.'s separate estate to secure it; but in order to do this he had to give Mrs. P. his own non-negotiable note, payable at twelve months, for the same amount. Both Parker and his wife knew this arrangement was for Lamb to raise money, and Lamb assigned to Etheridge for full value the note of Parker and wife, secured as aforesaid, without any knowledge on the part of Etheridge of the note given Mrs. P. by Lamb. *Held*, under the circumstances, Etheridge is not affected by any equities which might be supposed to exist between Lamb and Parker and wife, and is entitled to have his debt enforced against Mrs. P's separate estate. *Etheridge v. Parker*, S. C. App. Va., March Term, 1882, 6 Va. L. J., 428.

17. ESTOPPEL IN PAIS—REPRESENTATIONS.

A party is not estopped from asserting a right belonging to him against another party unless he has made a representation or concealment in a matter of fact important to the interest of the other party upon which the other party was authorized to rely, and in fact did actually rely, to his prejudice. A mere expression of opinion, upon facts equally known or open to both, is not a representation upon which a party has a right to rely within the meaning of the doctrine of estoppel. *Hurt v. Ruffle*, U. S. C. C., D. Ind., May, 1882, 11 Fed. Rep., 790.

18. EVIDENCE—BREACH OF PROMISE—MEASURE OF DAMAGES.

Contracts of promise to marry differ from ordinary contracts, and upon a trial for breach of same it was *held:* 1. All the circumstances of the case and the surroundings of the parties should be submitted to the jury. 2. Evidence of the value of the defendant's estate, and of the mortification and pain of mind the plaintiff suffered from his refusal to fulfill the promise, is competent to be considered by the jury as a standard by which to measure the plaintiff's disappointment and the extent of her loss. *Allen v. Baker*, S. C. N. C., 1 Am. Law Mag., 191.

19. EVIDENCE—DECLARATIONS OF DECEASED PERSONS—DATES.

Matters of public or general interest may be proved by the declarations of deceased persons; but not dates or particular facts which are not in themselves matters of general knowledge, though connected with those that are. *Southwest School District v. William*, S. C. Errors Conn., 14 Ch. Leg. News, 322.

20. EVIDENCE—IMPEACHMENT OF WITNESS—REPUTATION.

1. In an attempt to impeach a witness, evidence of what his reputation was just before the suit was commenced is admissible to determine his present character. 2. If the reports as to his reputation arose out of the pending controversy, this fact would materially lessen the weight of the testimony. *Amidon v. Hasley*, S. C. Vt., February Term, 1882, Reporter's Advance Sheets.

21. EXEMPTION—WHEN DOES THE RIGHT ACCRUE—IMMIGRANT.

A, the head of a family, removed to Nebraska with his family, intending to reside there. Shortly after, and before he occupied a dwelling, his personal property was attached on the ground that he was a non-resident. *Held*, that he was entitled to the benefit of the exemption law. *Held*, further, that exempt property may be claimed at any time before it is sold. *Chesney v. Francisco*, S. C. Neb., 14 Ch. Leg. N. 316.

22. INFANCY—RESCISSION OF MINORS' CONTRACTS—RETURN OF CHATTELS.

The rescission of a minor's contract in this manner, by the return of chattels bought, through the intervention of an agent employed by him for that purpose, is not manifestly nor necessarily prejudicial to the minor, and is therefore not to be classed nor regarded as void; and his appointment of an agent for such purpose is at the worst only voidable; and the opposite party, when thus notified of the rescission, if he refuses to accept the consideration returned, and restore the property, can no longer shield himself under the contract. Even if the failure of the infant to present himself personally to make the rescission were to be regarded as a valid objection—still, if the other party, without questioning the authority of the agent to act in the premises at the time of the tender and demand, simply refuses to restore the property and accept the tender, he may be regarded as waiving the objection. The disability of infancy is a personal privilege which the infant and his legal representatives only are entitled to assert. *Towle v. Dresser*, S. C. Me., March 9, 1882, Reporter's Advance Sheets.

23. INSOLVENCY—COMPOSITION INDUCED BY FRAUD.

A compromise voluntarily made without any fraud or imposition will not be set aside, however disadvantageous it may be; but if a debtor fraudulently conceals his property, and by a false and fraudulent representation of his inability to pay induces his creditors to compound his debt, the creditor will not be bound by the composition. *Ackerman v. Ackerman*, S. C. N. J., Feb. Term, 1882, 5 N. J. L. J., 179.

24. JURISDICTION—RECOGNIZANCE.

No recovery can be had upon a recognizance taken

in a suit or proceeding when the court to which it is returnable has no jurisdiction of the subject matter. *Pike v. Neal*, S. C. Me., May 31, 1882, Reporter's Advance Sheets.

25. JUDGMENT—UNASSIGNED—PRIORITY.
A father gave a deed of trust on his real and personal property to secure two debts to his son and one to the trustee of his wife. The deed was substantially in the form prescribed by the Code, and no priority was given any of the debts secured. One of the debts due the son, however, arose out of a judgment which had been obtained against the father, prior to the deed, by another creditor, which debt had been paid off by the son, but no assignment of the judgment taken to himself, although it is referred to in the deed as an execution against the father, which had been settled by the son. Upon the question whether, in the distribution of the trust fund, this debt is entitled to priority. *Held*, it is not, and all three of the debts are to be paid off *pari passu*. *Clark v. Moore*, S. C. App. Va., March Term, 1882, 6 Va. L. J., 434.

26. MANDAMUS—ISSUE OF CORPORATE STOCK.
The weight of authority inclines against the right to employ *mandamus* to compel certificates of stock to be issued by a corporation, upon the ground that the petitioner for *mandamus* can receive full indemnity by purchasing other shares in the market and recovering the price thereof against the corporation in an action of law. *Mandamus* does not lie, unless the petitioner's right to the possession of the shares is clear. If the right claimed is a doubtful one, involving the necessity of litigation to settle it, the remedy by *mandamus* must be denied. *Townes v. Nichols*, S. C. Me., May 31, 1882, Reporter's Advance Sheets.

27. NEGLIGENCE—PROXIMATE AND REMOTE CAUSE—SUICIDE.
A railroad company is not liable for the death of a person who commits suicide by reason of insanity brought on by an injury inflicted by the company's negligence. *Scheffer v. Washington City, etc. R. Co.*, U. S. S. C., 5 N. J. L. J., 169.

28. NEGLIGENCE — REASONABLE CARE AND PRUDENCE—SEX.
In questions of contributory negligence, the rule as to reasonable care and prudence is not affected by the sex of the plaintiff; the same care and caution is required in the case of a woman as of a man. *Michigan Central R. Co. v. Hasseneyer*, S. C. Mich., April, 1882, 6 Va. L. J., 439.

29. PLEADING—EQUITY—ALLEGATION OF FRAUD.
A general allegation of fraud is not sufficient in a bill in equity praying for relief, the acts constituting the fraud must be set out. Where the bill alleges that the defendant made fraudulent representations, which are relied upon as constituting the fraud, it should also allege, that the representations were false and made with the knowledge of their want of truth, or made by the party as of his own knowledge when he had no knowledge. *Stevens v. Moore*, S. C. Me., June 1, 1882, Reporter's Advance Sheets.

30. SUBROGATION—VOLUNTARY PAYMENT.
The principle of subrogation, in the absence of special agreement, applies only where the payment is made by one, who is surety for the debt, or is compelled to pay it, in order to protect his own interest, and not where the payment is made voluntarily and without any assignment of the lien. *Clark v. Moore*, S. C. App. Va., March Term, 1882, Va. L. J., 434

31. WILL—PAROL EVIDENCE TO ESTABLISH DEVISE.
A party seeking to maintain a devise must show it by the will itself, and no defects in the language used in the instrument can be supplied by parol proof. The true inquiry is, not what the testator meant to express, but what the words used do express. Evidence is however always admissible of the condition of the testator's family and his surroundings to throw light upon his intentions in cases of difficulty. If, however, there be found a subject which satisfies the condition of the property as contained in the will, parol evidence can not be admitted to show that a different subject is meant. The only exception to the rule excluding parol testimony of the intention of the testator, in cases of latent ambiguity, which does not exist in this case. *Burk v. Lee*, S. C. App. Va., March Term, 1882, 6 Va. L. J. 420.

LEGAL EXTRACTS.

OLD INNS OF COURT CUSTOMS.

The history of the Inns of Court in days gone by, apart from its legal interests, affords us a good insight into the festive and social life of our forefathers. Indeed, the merry doings associated with these old institutions are proverbial, and many a graphic picture has been bequeathed to us illustrative of the joviality which once formed a prominent characteristic on all seasons of rejoicing. Thus, it may be remembered, that in the hall of the Middle Temple was performed Shakespeare's "Twelfth Night," a fact recorded in the table-book of John Manningham, a student of the Middle Temple: "Feb. 2, 1601-2. At our feast we had a play called 'Twelfth Night, or What You Will.'" As Charles Knight remarks in his "Pictorial Shakespeare," "it is yet pleasant to know that there is one locality remaining where a play of Shakespeare was listened to by his contemporaries, and that play 'Twelfth Night.'" We read, too, how, in the reign of Charles I., the students of the Middle Temple were accustomed at All Hallow-tide, which they considered the beginning of Christmas, to prepare for the festive season, an account of which we find in Whitelock's "Memoirs of Bulstrode Whitelock." Evelyn alludes to the Middle Temple feasts, and describes that of 1688 as "very extravagant and great, as the like had not been seen at any time." Equally famous were the entertainments at the Inner Temple—Christmas, Candlemas, Ascension Day and Halloween having been observed with great splendor. In 1561, the Christmas revels were kept on a very splendid scale. At breakfast, brawn, mustard and malmsey were served; and at the dinner in the hall several imposing ceremonies were gone through. Thus it is related how, between the two courses, first came the master of the game, then the ranger of the forests, who, having blown three blasts of the hunting-horn, paced three times around the fire, then in the middle of the hall. Nine or ten couple of hounds were then brought in, with a fox and a cat, which

were set upon by the dogs, amidst the blowing of horns. At the close of the second course the oldest of the masters of the revels sang a song. Finally, after supper, the Lord of Misrule addressed himself to the banquet, which, amongst other diversities, generally concluded with minstrelsy and dancing.

Many of the dinner customs of the Inns of Court are curious. Thus a banquet at the Inner Temple is a grand affair. At six, the barristers and students in their gowns follow the benchers in procession to the dais; the steward strikes the table three times, grace is said by the treasurer or senior bencher present, and dinner commences. The waiters are called "panniers," from the "panarii" who attended the Knight Templars; and in former years it was the custom to blow a horn in every court to announce the meal. The loving cups used on important occasions are huge silver bowls, which are passed down the table filled with time-honored "sack," which consists of "sweetened and exquisitely-flavored white wine;" each student being restricted to a "sip." On the 29th of May a gold cup of this fragrant beverage is handed to each member, who drinks to the happy restoration of Charles II.

Referring to the customs once observed at the Middle Temple banquets, many of these have died out. "The loving cup," Mr. Thornbury remarks in "Old and New London" (I. 179), "once fragrant with sweetened sack, is now used to hold the almost superfluous toothpicks. Oysters are no longer brought in, in Term, every Friday before dinner; nor when one bencher dines does he, on leaving the hall, invite the senior bar-man to come and take wine with him in the Parliament Chamber (the accommodation-room of Oxford Colleges)." Dugdale informs us that "until the second year of Queen Elizabeth's reign, this society did use to drink in cups of aspenwood; but then those were laid aside, and green earthenware pots introduced, which have ever since been continued." Amongst the old customs associated with the Middle Temple may be mentioned the calves'-head breakfast which was given by the chief cook of the society to the whole fraternity, for which every member paid at least one shilling. In the eleventh year of James I., however, this breakfast was turned into a dinner, and appointed to be held on the first and second Monday in every Easter Term. The price per head was regularly fixed, and to be paid by the whole society, as well absent as present, and the sum thus collected was divided amongst all the domestics of the house.

The merry doings at Lincoln's-Inn were, in days gone by, kept up with much enthusiasm; and frequent notices of the "Revels" are given by our old writers. Charles Knight, too, in his "Cyclopædia of London," tells us that on such occasions dancing and singing were insisted on, and, by an order of Feb. 6, in the 7th James I., it appears that "the under-barristers were by decimation put out of commons for example's sake, because the whole Bar were offended by their not dancing on the Candlemas Day preceding, according to the ancient order of the society, when the judges were present." Of the social customs formerly observed, we read that at each mess it was a rule that there should be a "moot daily;"—the junior member of each mess having to propound to the rest at his table some knotty question of law, which was discussed by each in turn during the dinner. Not many years ago, too, it was the custom for one of the servants, attired in his robes, to go to the threshold of the outer door about twelve or one o'clock, and call out three times, "Venez manger." To quote a further old custom, in the first year of Elizabeth, it was ordered "that no Fellow of the House should wear a beard of above a fortnight's growth, under a penalty of loss of commons, and, in case of obstinancy, of final expulsion."

Gray's-Inn, again, formerly had its masques and revels, when the presentation of plays seems to have been one of the chief features. A comedy, acted at Christmas, 1527, written by John Roos, a student of the inn, so offended Wolsey that its author was actually imprisoned. Amongst the many customs relating to the dining-hall, we are told that in 1581 an agreement was made regarding Easter, in accordance with which the members who came to breakfast after service and communion were to have "eggs and green sauce," at the expense of the House, and that "no calves' heads were to be provided by the cook." In the year 1600 the members were instructed not to come into the hall with their hats, boots or spurs; but with their caps, decently and orderly, "according to ancient orders." Gray's-Inn has also been noted for its exercises known as "bolting," which is thus defined in Cowell's Law Dictionary —"Bolting is a term of art used in Gray's-Inn, and applied to the bolting or arguing of *moot* cases."

Lastly, a very curious dinner custom has in years gone by been kept up at Clifford's-Inn. The society consists of two distinct bodies—"the Principal and Rules," and the junior members, or "Kentish Mess." Each body has its own table. At the conclusion of the dinner the chairman of the Kentish Mess, first bowing to the Principal of the Inn, takes from the hand of the servitor some small rolls or loaves of bread, and, without saying a word, he dashes them three several times on the table; he then discharges them to the other end of the table, from whence the bread is removed by a servant in attendance. Solemn silence—broken only by three impressive thumps upon the table—prevails during this ceremony.—*Illustrated London News.*

RECENT LEGAL LITERATURE.

PLEADINGS, PARTIES AND FORMS, under the Code, Adapted to the Statutes of Ohio, in force, July, 1881, with full Authorities from all States using a Code, and Decisions from the Common Law Practice. By Clement Bates. In two volumes. Cincinnati, 1881: Robert Clarke & Co.

We believe that books of practice are always welcome to the profession, if honestly and carefully prepared. The work before us is based upon the Practice Act in force in Ohio in July, 1881, and the plan pursued by the author is to reprint the section of the statute applicable, and illustrate the rule established by a discussion in the form of notes, supported by abundant citations of authority from all the States in which a Code is in force. We have heretofore exprssed our disapprobation of the plan of constructing a text-book upon a topic, by reprinting a portion of the statutes applicable to the subject in hand and appending to each section citations of authority in the form of notes, as being illogical and inadequate to the treatment of the law of any given subject. 13 Cent. L. J. 220. This objection, however, does seem to be applicable in its full force to that collection of the statutes commonly termed the Code, though for own part we prefer to bestow the labor of study upon a treatise of the character of the volumes of Pomeroy and of Bliss, rather than upon a mere collection of citations applicable to respective sections of the statute. The work in question, however, should not be judged by the standard of a treatise. It is professedly no more than a digest, from which, in the language of the preface, "discussion has been, as far as possible, banished; the region of conjecture avoided; and the author's personal opinion suppressed." Limited to the functions, then, of a digest and book of forms, the utility of this work is unquestionable. The work upon it has been accurately and honestly done, and in every part seems to be carefully condensed. The forms which are scattered through the work under the appropriate divisions of the statute will be found particularly valuable to the young practitioner.

Though the work is framed upon the provisions of the Ohio Code, still, because of the great similarity of procedure in the Code States, it will be found practically useful in many other States and territories.

BRADWELL'S REPORTS. Reports of the Decisions of the Appellate Courts of the State of Illinois. By James B. Bradwell. Vols. 9 & 10. Chicago, 1882: Chicago Legal News Company.

There is no series of reports in the country, the issue of the volumes of which follow as closely upon the heels of the court's decision as is the case with the volumes before us. Mr. Bradwell has fully grasped the idea that it is an important function of a volume of reports not merely to preserve adjudications for the use of after generations, but to give them to the contemporary professional reader at the earliest date. The failure in this respect of many reporters is a shortcoming which many legal journals whose only, or chief, *pabulum*, consists of reports of cases, can view with a philosophy born of a substantial interest. Under any other system Othello's occupation would, to a great extent, be gone. Inasmuch, however, as reports of cases form but a small part of the varied feast which we offer our readers, we are in a position to form an impartial opinion, and can not forbear the reflection that a little exertion and united effort on the part of the bar to have the issue of the reports follow closely upon the rendition of the judgments, would save time and money and greatly lighten professional labor.

NOTES.

——Hon. Stephen Longfellow, of Maine, when any objection or qualification was made by the court to a point he was pressing upon its attention, being too courteous to question or oppose the judge, would escape by this formula: "But there is this distinction, may it please your Honor," which distinction, when it came to be stated, was often so thin that its existence could only be discerned by the learned gentleman himself. This little mannerism was observed by his friends in the profession, one of whom composed and passed round this epitaph: "Here lies Stephen Longfellow, LL.D. Born, etc. Died, etc. With this distinction, That such a man can never die." The epitaph reached the Bench, and Mr. Longfellow, who not long afterwards, on an argument, was met by a question from the judge. "But may it please your Honor, there is this dis—" "Out with it, brother Longfellow," said Judge Story, with a good humored smile. But it would not come. The epitaph records the death of the distinction.

——The *Woman's Journal* tells a funny story of Belva Lockwood, the female lawyer of Washington. A witty fellow was once her opposing counsel, and when he desired to refer to the Hon. Belva, was perplexed. He couldn't say "my brother," as he did when speaking of the lawyers who wore trowsers. He didn't like to say "my sister," out of respect to that expression. He sent a smile over the room by referring to Belva as "my sister-in-law," but she certainly looked daggers at him.